Supreme Court, U.S.
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No. 94-321

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

JOHN J. KOZELKA

Petitioner

v.

JOSEPH WEIDER, MUSCLE AND FITNESS MAGAZINE, FLEX MAGAZINE, "I, BRUTE" ENTERPRISES, INCORPORATED, CONTEMPORARY BOOKS, INCORPORATED

Respondents

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 19, 1994

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW ON WRIT OF CERTIORARI	3
A. The Decisions Of The Courts Below Were Well-Grounded In Law	3
B. Petitioner Has Not Raised An Issue Of The Character For Which Certiorari Is Generally Granted	5
II. PETITIONER FAILED TO RAISE HIS BIAS ISSUE BELOW	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	Pages
FTC v. Grolier, Inc., 462 U.S. 19 (1983)	5
Miree v. DeKalb County, 433 U.S. 25 (1977)	5
Rogers v. Lodge, 458 U.S. 613 (1982)	5

RULES

Rule 10(a) of the Rules of the Supreme Court	5

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STATEMENT OF THE CASE

Petitioner, John J. Kozelka ("Petitioner"), acting *pro se*, filed his initial Complaint herein on August 10, 1992, against Respondent Joseph Weider in the United States District Court for the District of Connecticut. Petitioner filed an Amended Complaint on September 3, 1992, adding Respondents *Muscle and Fitness* Magazine, *Flex* Magazine, "I, Brute" Enterprises, Inc., and Contemporary Books, Inc. (hereinafter with Respondent Joseph Weider referred to as "Respondents") as parties.[1]

[1] In accordance with Rule 29.1, Respondents state that the parent company of Contemporary Books, Inc. is the Tribune Company. Weider Health and Fitness, a Nevada corporation, is owned by MLE Holdings, Ltd., a privately owned investment holding company incorporated in Canada. "I,

R-11 through R-54.[2] Petitioner alleged that he was injured by statements and representations contained in the magazines *Muscle and Fitness* and *Flex*, and in several books authored by Mr. Weider.

Respondents moved to dismiss the Amended Complaint. Before that motion could be decided, however, Petitioner filed several motions to amend and supplement his Amended Complaint. Petitioner's motions were granted by the District Court. R-55, R-56. Respondents moved to dismiss the Amended Supplemented Complaint, and their motion was granted. R-118. Petitioner appealed the District Court's decision, and the decision was affirmed by the Second Circuit Court of Appeals.

In his Amended and Supplemented Complaint, Petitioner alleged that he was a bodybuilder with an ectomorphic body type, and that statements contained in Respondents' publications to the effect that the ultimate muscle size which a bodybuilder can achieve is determined in part by genetics have ridiculed and belittled the masculinity of ectomorphic men. Petitioner alleged that these statements constituted libel, intentional infliction of emotional distress, negligence or recklessness, and invasion of his right of privacy. R-66, R-70, R-71.

Petitioner also alleged that Respondents were liable under the theories of fraud and misrepresentation, injurious falsehood, breaches of express and implied warranties, and strict liability. Petitioner asserted that Respondents' publications implied that bodybuilders could achieve large muscle size through the use of

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Brute" Enterprises Incorporated, a California corporation, is owned by Weider Publications, Inc., which, in turn, is owned by Weider Health and Fitness. *Muscle & Fitness* Magazine and *Flex* Magazine are not legal entities but are monthly periodicals published by "I, Brute" Enterprises Incorporated. Defendant Joseph Weider is an employee of "I, Brute" Enterprises Incorporated but holds no ownership interest in any of the aforementioned entities.

[2] References to the Record are to the Appendix filed by Respondents with the Second Circuit Court of Appeals.

"mental strength, visualization, effort, persistence, belief and training methods," when, in fact, the only way to achieve the massive muscle size pictured in Respondents' publications was through the use of steroids. R-73.

SUMMARY OF ARGUMENT

Petitioner seeks certiorari based largely on his claim that he is a victim of an endemic prejudice which exists throughout the judicial system against *pro se* litigants. Petitioner's argument is based in large part on the fact that his Amended and Supplemented Complaint was dismissed by the District Court, and that the dismissal was upheld by the Second Circuit Court of Appeals. The dismissal of Petitioner's complaint, however, was well-grounded in law, and the result would have been the same had Petitioner been represented by counsel. Therefore, even if there were a bias among courts against *pro se* litigants, this is not an appropriate case for review.

Moreover, Petitioner failed to raise the issue of bias before the District Court or the Court of Appeals, and the issue of bias was not decided by either of these courts. Therefore, the issue of bias is not properly before this Court.

Finally, Petitioner has not raised an issue of the type for which certiorari is generally granted. Petitioner has not raised any issue regarding which the courts of appeal are divided; nor is the decision of the District Court and Court of Appeals a departure from the usual course of proceedings.

ARGUMENT

I. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW ON WRIT OF CERTIORARI

A. The Decisions Of The Courts Below Were Well-Grounded In Law

Petitioner asserts that certiorari is warranted because the decision to dismiss his Amended and Supplemented Complaint

was based on an alleged bias by the District Court and the Court of Appeals against *pro se* litigants. Petitioner's argument is based, in large part, on Petitioner's position that the judgments of the courts below were contrary to law. However, the District Court, in its opinion dismissing Petitioner's complaint, gave cogent, proper explanations for its dismissal of each of the counts of that complaint. The opinion of the District Court had a solid foundation in legal precedent, and contains numerous citations to supporting legal authority.[3] The Court of Appeals properly affirmed for substantially the same reasons set forth by the District Court.[4]

Moreover, the history of this litigation makes clear that Petitioner has been given every opportunity to present his case. Plaintiff moved to amend or supplement his complaint no less than eight times. On December 3, 1992, the District Court granted Petitioner's first five motions to amend and supplement. (R-55). In its opinion dismissing Petitioner's Amended and Supplemented Complaint, the District Court granted the Petitioner's remaining motions to supplement, and stated that the supplements had been considered in its ruling on Respondents' Motion to Dismiss. (Petitioner's Appendix, at 11A-12A). The District Court also granted Petitioner's Motion for Leave to File a Reply to Respondents' Motion to Dismiss, which was also considered by the court in rendering its decision on Respondents' Motion to Dismiss. (Petitioner's Appendix, at 11A).

This is not a case in which a *pro se* litigant was the victim of biases or prejudices of the courts below. Petitioner's complaint, and his arguments in opposition to Respondents' Motion to Dismiss, were given every consideration. Petitioner simply failed to state a claim upon which relief can be granted.

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[3] The District Court's opinion is set out at 3A-12A of the Appendix to Petitioner's Petition for Writ of Certiorari.

[4] The opinion of the Court of Appeals is set out at 1A-2A of the Appendix of Petitioner's Petition for Writ of Certiorari.

B. Petitioner Has Not Raised An Issue Of The Character For Which Certiorari Is Generally Granted

Rule 10.1(a) of the Rules of this Court states that, in general, a decision of a United States court of appeals is considered for review when: (1) the decision is in conflict with decisions of another court of appeals on the same issue; (2) when a decision on a federal question conflicts with the decision of a state court of last resort; or (3) when the decision evidences such a departure from the accepted and usual course of proceedings that supervision is warranted. None of these circumstances is present in this case.

The decision of the Second Circuit Court of Appeals does not conflict with decisions of any other court of appeals and does not address any federal question. Nor is this a case in which the District Court or the Court of Appeals departed from the accepted course of proceedings. As discussed above, the decisions of the District Court and the Court of Appeals were well-grounded in law, and Petitioner was granted every opportunity to present his case. Accordingly, this case raises no issue of the type generally accepted for review by this Court, and for this reason alone the Petition for Writ of Certiorari should be denied.

II. PETITIONER FAILED TO RAISE HIS BIAS ISSUE BELOW

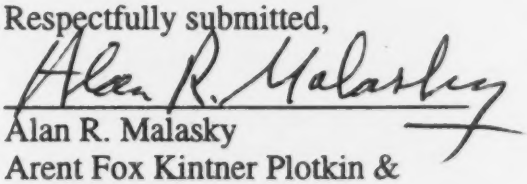
As a general rule, this Court has refused to consider issues which were neither raised nor addressed below. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977). Petitioner in this case never once raised the issue of bias below. While his Petition to this Court discusses recusal at length, Petitioner never sought to recuse any of the judges in the courts below. Nor did Petitioner ever complain of bias in any of his submissions to either the District Court or the Court of

Appeals. Petitioner's failure to raise the issue of bias at any point in the proceedings below is further reason to deny the instant Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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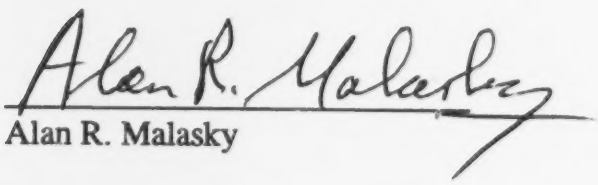
Attorney for Respondents

September 19, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Opposition to Petition for Writ of Certiorari was served this 19th day of September, 1994, by first-class mail, postage prepaid, upon the following:

John J. Kozelka
276 Route 87
P.O. Box 84
Columbia, CT 06237



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